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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
Appellee.

APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee, M. E. THOMPSON, State Revenue Commissioner of the State of Georgia, believing that the matter set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this, his statement, in opposition of appellant's statement as to the jurisdiction. Appellee includes herein his motion to dismiss the appeal, or in the alternative, to affirm the judgment of the Supreme Court of Georgia on the ground that the questions raised on behalf of appellant are so unsubstantial as not to need further argument.

Appellee asserts that the unsubstantial character of the grounds stated by appellant is so apparent on the face of

the record as to warrant the court in summarily disposing of the case at this stage of the proceedings.

The matters here relied on by appellee are more particularly stated below.

I

Appellant bases its appeal on the erroneous assumption that there is a contract between the State of Georgia and the Atlantic Coast Line Railroad Company whereby the State has exempted the income of said appellant earned in the operation of a certain railroad and that the income tax act of 1931, as enforced by the disposition of the Supreme Court of Georgia, impairs the obligation of this contract.

Before the Supreme Court of the United States would have jurisdiction of the foregoing, it would have to appear

(a) That there was a contract between the State of Georgia and the appellant, or

(b) that there was a contract between the State of Georgia and some person in privity with the appellant whereby the appellant was entitled to an exemption from income taxes on income earned by this particular railroad.

The record shows no evidence of a contract of any kind between the State of Georgia and the appellant. Neither does the record show any contract for the exemption of income taxes of either the appellant or any person in privity with the appellant.

Appellant, the Atlantic Coast Line Railroad Company, is a mere tenant of the Georgia Railroad and Banking Company. This was so held in the decree of the court in the case of *Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company* v. *William A. Wright*, comptroller-general, this being the same case re-

ferred to in paragraph four in the assignment of error of plaintiff in the 236 U. S. 687, the decree being as follows:

"Considered, adjudged and decreed as follows:

1. That the lease executed by the Georgia Railroad & Banking Company to William M. Wadley, exhibited to the bill of complaint in this cause of which the complainants are assignees under said Wadley, created the relation of landlord and tenant between the parties thereto and did not vest in said lessees any estate, but only an usufruct, which is not subject to be taxed to said lessees, and that the property covered thereby, with its renewals, alterations and betterments made by the lessee is not subject to *ad valorem* taxation."

This case emphasizes the fact that the only contract that was made was between the State of Georgia and the Georgia Railroad and Banking Company. The income claimed to be exempt was earned by defendant through the employment of its capital, the employment of labor, expert management, the correlating of its other railroads with this particular railroad, and lastly by the use of the property of the Georgia Railroad, which, as tenant, it has operated.

The charter of the Georgia Railroad and Banking Company contains no contract for the exemption from income taxes of either the appellant or its landlord, the Georgia Railroad and Banking Company.

The record shows that there was no contract with the Georgia Railroad and Banking Company, appellant's landlord, for the exemption of any income taxes either to the landlord or to any tenant of the landlord. Section 15 relied on as being a contract for the exemption of income taxes reads as follows: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the comple-

tion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments."

The Supreme Court of the United States in the case of *Wright* v. *Georgia Railroad and Banking Company*, 216 U. S. 420, construed this as a property tax based on net profits. We quote headnote 5 of this decision: "A tax upon the franchise of a railway company impairs the obligation of a charter exemption from any property tax other than one based on its net profits."

No Federal questions are involved in the assignments of error by appellant because the Supreme Court of Georgia did not follow the decisions of the United States Supreme Court in the cases of *Wright* v. *Georgia Railroad and Banking Company*, 216 U. S. 420; *Wright* v. *Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company*, 236 U. S. 687; *Wright* v. *Central of Georgia Railway Company*, 236 U. S. 674; *Central of Georgia Railway Company* v. *Wright*, 248 U. S. 525; 250 U. S. 519. All of these cases involve the question of property taxes. The State of Georgia during this period of time did not even levy a general income tax.

Wherefore there being no Federal question involved in this case, no contract from the State of Georgia with the Atlantic Coast Line Railroad Company, nor any contract for the exemption of income taxes of appellant, the appeal should be dismissed.

2

If, for any reason, the appeal is not dismissed the judgment of the Supreme Court of Georgia should be affirmed because the questions raised on behalf of appellant are so unsubstantial as to need no further argument. The issues raised by appellant have already been determined by the

Supreme Court of the United States in numerous decisions, and hence an appeal on these grounds which have already been determined by the United States Supreme Court are so unsubstantial a character as to justify this court in affirming the judgment of the Supreme Court of Georgia at this stage of the proceedings.

The issue involved in this case is whether income from tax exempt property is exempt from the payment of income taxes.

Prior to 1937 the United States Supreme Court held that income from the exempt property was also exempt. Since 1937 the United States Supreme Court has consistently held that income from tax exempt property is not exempt from the payment of income tax. During that year the case of *Hale v. Iowa State Board of Assessment and Review*, 302 U. S. 95, 58 Sup. Ct. 102, came up before this court. The ruling in this case is so overwhelming that it should be a complete answer in the affirmative as to whether the Supreme Court of Georgia was correct in holding that the income earned by appellant from the operation of the Georgia Railroad was taxable.

The question in the *Hale* case was whether the interest upon bonds of the State of Iowa, or its political subdivisions, could be included in an assessment of a tax on the net income of the owners without detracting from earlier exemptions in respect to taxes upon property and without an unconstitutional impairment of the obligation of a contract.

In that case, the taxpayer, a resident of Iowa, owned bonds issued by Iowa School Districts, Iowa Road Bonds, Iowa County Bonds and Iowa Soldiers' Bonus bonds. At the time these bonds were issued the statute provided that such bonds "are not to be taxed" or "shall be exempt from taxation." At the time Iowa had no income tax, just as

Georgia levied no income tax in 1833. Later Iowa imposted an income tax, just as Georgia did, and an attempt was made to tax the income derived from the interest of these bonds. The taxpayer pleaded the impairment of the obligation of the contract of exemption. The Supreme Court of Iowa upheld the assessment and interpreted the contracts as limited to taxes laid directly upon property in proportion to its value and not as touching taxes in the nature of an exercise on the net income of the owner.

This case was carried to the United States Supreme Court by appeal. For the convenience of the court, we quote the material headnotes of this case and also portions of the opinion:

"2. The Supreme Court leans toward agreement with State courts and accepts their judgment as to whether State statute impairs obligation of contract unless manifestly wrong.

"4. Grants of immunity from taxation, in derogation of sovereign power of the State, are strictly construed.

"5. Even if Iowa statute exempting bonds of State of Iowa and its political subdivisions from taxation created a contract, determination of Supreme Court of Iowa that contract was limited to taxes laid directly upon property in proportion to its value, and did not include taxes in nature of an excise upon net income of an owner, was not unreasonable (Code Iowa 1935, §§ 4753-a13, 4753-a14, 6943-f4 et seq. 6944 (5), 6944 (22), 6953, 7171; Const. U. S. art. 1, section 10).

"6. Even if Iowa statute exempting bonds of Iowa and its political subdivisions from taxation created a contract, interest on such bonds could be included in assessment of tax on net income of owners of bonds without an unconstitutional impairment of obligation of contract (Code Iowa 1935), sections 4753-a13, 4753-a14, 6943-f4 et seq. 6944(5), 6944(22), 6953, 7171; Const. U. S. art. 1, section 10)."

We quote from the opinion:

"... Many, perhaps most, courts hold that a net income tax is to be classified as an excise. 'The tax levied on income is not a property tax, but it is a percentage laid on the amount which a man receives, irrespective of whether he spends it, wastes it, or invests it.' Featherstone *v.* Norman, 170 Ga. 370, 382, 153 S. E. 58, 65, 70 A. L. R. 449; Purnell *v.* Page, 133 N. C. 125, 129, 45 S. E. 534. ..."

We quote again from the opinion:

"The taxpayer in People ex rel. Clyde *v.* Gilchrist (262 U. S. 94) claimed the benefit of an exemption under a statute of New York to the effect that, upon payment of a recording tax, debts and obligations secured by mortgages of real property should be exempt from other taxation by the State and local subdivisions. The question was whether the exemption thus accorded was applicable to an income tax enacted long afterwards. The State court ruled against the taxpayer (People ex rel. Central Union Trust Co. *v.* Wendell, 197 App. Div. 131, 188 N. Y. S. 344; People ex rel. Clyde *v.* Wendell, 197 App. Div. 913, 187 N. Y. S. 949; Id., 232 N. Y. 550, 134 N. E. 567), assuming the existence of a contract of exemption, but holding that it was not intended to apply to taxes upon income. This court considering the fact that at the date of the exemption statute 'no one thought of an income tax,' and recalling that 'any contract of exemption must be shown to have been indisputably within the intention of the legislature,' sustained the judgment of the State court, 'The conclusion does not seem to us very difficult to reach.'" (Emphasis supplied.)

"The controversy in New York ex rel. Cohn *v.* Graves, (300 U. S. 308, 47 Sup. Ct. 466), decided at the last term, evoked a ruling by this court that a State tax upon net income which included rents derived from land in another State was not equivalent to a property tax imposed upon

the land itself. 'The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed, although it produces no income.'" . . . This line of thought was also followed in the case of *United States Trust Co.* v. *Helvering, Com'r.*, 307 U. S. 57, 59 Sup. Ct. 692, where an exemption from the estate tax was denied the administrator of a World War veteran.

In the case of *J. D. Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, 58 Sup. Ct. 915, the same question came up relative to income tax on property exempt from property tax. The court ruled that the case of *Hale* v. *Iowa State Board*, 302 U. S. 95, controlled in this case.

In the case of *Silas Mason Company* v. *Tax Commissioner of the State of Washington*, 302 U. S. 186, 59 Sup. Ct. 233, the court held that a gross income tax levied by the State of Washington would apply to construction contracts with the United States.

Again the case of *Atkinson* v. *Tax Commissioner of Oregon*, 303 U. S. 20, 58 Sup. Ct. 419, the court held that the Oregon personal income tax would apply to the net income derived from the construction of the dam within such State with a contract with the United States.

Still again in *Helvering* v. *Bankline Oil Company*, 303 U. S. 62, 58 Sup. Ct. 616, the court held that the holder of a lease from a State of oil and gas tide-lands is subject to Federal income tax upon the profits of its operations and is not exempt on the ground that such tax is an unconstitutional burden upon a State instrumentality.

Again in the case of *Helvering* v. *Mountain Producers Corp.*, 302 U. S. 376, 58 Sup. Ct. 623, the income was received by a lessee under a lease from the State and the

court held it was not exempt from income tax on the theory that the recipient of the income is a State instrumentality.

Again in the case of *New York Rapid Transit Corporation* v. *State of New York*, 303 U. S. 573, 58 Sup. Ct. 721, there was an attempt to plead a contract not to lay any new taxes upon the corporation. The court held against the alleged exemption, holding that, "Where one relies upon exemption from taxation both the power to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the people." The court also used the following language applicable to the case at bar: "Where the intention was to prevent the imposition of any new taxes, adequate language was available."

It will be noted that in all the foregoing cases the United States Supreme Court completely reversed the trend of former decisions relative to tax exemptions and overruled either specifically or by implication all those decisions contrary to this new line of thought. Since that time the United States Supreme Court has held to this theory that all should bear their part of the burdens incident to the maintenance of our government. The case of *Graves* v. *New York*, 306 U. S. 466, 59 Sup. Ct. 595, followed this same trend. In that case an exemption from income tax by the State of New York on the salary of an employee of the Home Owners Loan Corporation was claimed. The court used the following forceful language: "(8) "The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when re-

ceived as compensation for his services; and the tax laid upon the privilege of receiving it is paid from the private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source is no longer tenable. . . ." (Emphasis supplied.)

Wherefore, appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument or further consideration of this court and appellee respectfully moves the court to dismiss this appeal, or in the alternative to affirm the judgment of the Supreme Court of Georgia.

This 24th day of July, 1946.

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